12 CV 4339 (ALC)(JLC)

**PLAINTIFFS' MOTION** 

FOR PRELIMINARY CLASS ACTION

**AFFIDAVIT OF** 

**FERNANDO** 

**HERNANDEZ** 

**IN SUPPORT OF** 

**CERTIFICATION** 

## UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

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FERNANDO HERNANDEZ, KENNETH CHOW, BRYANT WHITE, DAVID WILLIAMS, MARQUIS ACKLIN, CECILIA JACKSON, TERESA JACKSON, MICHAEL LATTIMORE and JUANY GUZMAN, Each Individually, And On Behalf Of All Other Persons Similarly Situated,

Plaintiffs,

-against-

THE FRESH DIET INC.,
LATE NIGHT EXPRESS COURIER SERVICES, INC. (FL),
FRESH DIET EXPRESS CORP. (NY),
THE FRESH DIET - NY INC. (NY),
FRESH DIET GRAB & GO, INC. (FL) a/k/a
YS CATERING HOLDINGS, INC. (FL) d/b/a
YS CATERING, INC. (FL),
FRESH DIET EXPRESS CORP. (FL),
SYED HUSSAIN, Individually,
JUDAH SCHLASS s/h/a JUDAH SCHLOSS, Individually,
and ZAIMI DUCHMAN, Individually

Defendants.	
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**FERNANDO HERNANDEZ**, being duly sworn and subject to the penalties for perjury, deposes and says:

- 1. I am a New York resident and a former driver/food delivery employee for the Defendants.
- 2. I am a named Plaintiff in this action. I submit this affidavit in support of Plaintiffs' motion to certify this matter as a class action pursuant to Fed. R. Civ. P. 23 and based on the laws of the State of New York, including the New York Labor Law, with me as one of the class representatives.

- 3. I submit this affidavit based on my personal knowledge and I am prepared and competent to testify with respect to the matters set forth in this affidavit.
- 4. I previously have sworn to two affidavits in this action. I swore to an affidavit on July 9, 2012 in support of a motion for injunctive relief re: retaliation, and I swore to a second affidavit on September 24, 2012 in support of Plaintiffs' motion for preliminary or conditional collective action certification.
  - 5. I reaffirm all of the statements in my prior two affidavits.
- 6. My job responsibilities as a driver/food delivery employee consisted of showing up to The Fresh Diet, Inc.'s Brooklyn facilities, receiving instructions as to my delivery routes, obtaining prepared meals, and personally delivering them to The Fresh Diet, Inc.'s customers throughout New York City and the tri-state metropolitan area, including locations in New York, New Jersey and Connecticut. After completing my meal deliveries, I would have to return to The Fresh Diet, Inc.'s Brooklyn facilities to check back in, complete required paperwork and return empty Fresh Diet bags.
- 7. Throughout my employment, my work was performed under the supervision, direction and control of Defendant Syed Hussain, who was the New York City-area Regional Delivery Manager for The Fresh Diet, Inc. and closely related companies. Defendant Hussain worked out of the Fresh Diet, Inc.'s Brooklyn facility and maintained an office there.
- 8. Throughout my employment, I often worked significantly in excess of forty (40) hours a week, yet was never paid overtime compensation of one and one-half (1.5) times my regular rate of pay.
- 9. During my employment with the Defendants, I interacted with other drivers/food delivery employees on a daily basis. I therefore know that my own experiences were typical of

how we were all supervised and compensated. Moreover, my duties, tasks and responsibilities were, in all material respects, the same as those of the other drivers and/or food delivery employees.

- 10. Based on my personal knowledge, which includes my personal experiences and observations, as well as my conversations with other drivers/food delivery employees, the following is true:
  - (a) All drivers who worked for Defendants in the New York City area (the "New York City-area drivers") were under the supervision, direction and control of Defendant Hussain;
  - (b) All assignments were received from Defendant Hussain, and the New York City-area drivers had to do the work they had been assigned;
  - (c) All New York City-area drivers had to report to Defendant Hussain at the beginning and end of each shift that they worked. At the end of their shifts, all New York City-area drivers had to report how many meals they had delivered, how many miles they had driven, and how many stops they had made. They also had to return empty bags. New York City-area drivers who did not comply with these requirements were subject to discipline, such as reductions in wages often characterized as "fines" and "penalties", up to and including termination.
  - (d) All New York City-area drivers were expected to report to work at specific times. The schedules were created by Defendant Hussain. New York City-area drivers could not decide when to show up for work. If they did not arrive to work at the assigned times they were subject to discipline, up to and including termination;
  - (e) The New York City-area drivers were not at liberty to choose their assignments. They could not refuse to do the work that they had been assigned;
  - (f) All New York City-area drivers had to complete the routes they had been assigned and to then report back to Defendant Hussain. If they failed to complete their assigned routes or if they missed an assigned stop, they were subject to discipline, up to and including termination;
  - (g) Defendant Hussain could change driver schedules and reduce or increase assignments at his complete discretion, without advance notice to the New York City-area drivers;

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- (h) All New York City-area drivers performed the same type of work. That is, each one showed up to The Fresh Diet, Inc.'s Brooklyn facility at his assigned time, each would receive his route assignment for his shift, each one would take the meals that had been prepared in the kitchen by the kitchen staff, and then deliver the meals to customers. There were no meaningful differences in the duties, tasks and responsibilities of the different drivers;
- (i) The delivery work was completely standardized. All drivers had to deliver the pre-prepared meals in the exact same way. Each meal had to be delivered in a bag provided by The Fresh Diet, Inc., and drivers had to return empty bags to the Brooklyn facility at then end of their shifts. What each New York City-area driver was required to do as far as delivering the meals to customers was the same as what any other driver was required to do, apart from the specific delivery routes;
- (j) New York City-area drivers could not arrange with one another to change their assignments without those changes being authorized in advance by Defendant Hussain;
- (k) New York City-area drivers who changed their assignments without first obtaining Defendant Hussain's approval were subject to discipline, up to and including termination;
- (l) Any driver who deviated from  $\P 10(a)-10(k)$  was subject to discipline, up to and including termination;
- 11. In addition to myself, I am aware and have personal knowledge that the Defendants employed many other similarly situated drivers and/or food delivery employees and routinely failed to pay them overtime compensation of one and one-half times their regular rates for those hours that they worked in excess of forty (40) per week.
- 12. I have reviewed the document attached as Exhibit A, which I understand was produced by the Defendants on or about December 21, 2012. I recognize the majority of names on this list. The people whose names I recognize also worked as drivers and/or food delivery employees for the Defendants, and were under the supervision, direction and control of Defendant Hussain. These individuals had the same duties, tasks and responsibilities that I had, and had to deliver meals to customers in the ways outlined in ¶ 10.

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13. I fully understand my responsibilities and duties as a class representative, should I be designated as such, and particularly that I would owe a duty of loyalty to the class that I represent. I understand that this means that I must look after the interests of the class, and will undertake my best efforts to vigorously prosecute the action on the class members' behalf and ensure that the class is treated fairly and its interests are protected. I will make myself available to participate in all activities required to conduct the case in a professional and effective manner, including, but not limited to locating witnesses, documents, and evidence, submitting to depositions and examinations, and attending conferences. I will not compromise the interests of the class members for my own personal gain.

14. I declare under perjury that the foregoing is true and correct.

FERNANDO HERNANDEZ

Sworn to before me on February 1, 2013

Notary Public State of New York

> Peter John Andrews Notary Public - State of New York No. 02AN6235372 Qualified in New York County My Commission Expires 2/07/2015

## **EXHIBIT A**

A Altin Maranio D	•				
ACKIIII, Marquis F	3236 Seymour		Bronx	NY	10469
Alexander, Banite	45b Birch Rd		Cedar Grove	N	07009
Alvarez, Julian	1245 Stratford Ave	Apt B-4	Bronx	NY	10472
Au, Vinh V	2069 E 14th St		Brooklyn	NY	11229
Banite, Chimeye Z	45 Birch Rd		Cedar Grove	NJ	07009
Barnett, Antione Tony	220 WOODWOLPH AV.	APT 1	Yonkers	NY	10701
Barrett, Michael A	6994 136th St		Flushing	NY	11367
Bermejo, Maria	95 Vanderveer St		Brooklyn	NY	11207
Bloomfield, Leonard S	280 Parkside Ave	Apt D1w	Brooklyn	NY	11226
Bonillia, Gladys M	4 River Rd	Apt 3k	Roosevelt	NY	10044
Brito, Rafael A	86-13 101 St		Richmond Hill	NY	11418
Britt, Jai	800 Soundview Ave		Bronx	NY	10473
Brown, William W	282 E 29th St		Brooklyn	NY	11203
Burgos, Angel L	252 Osborn St	Apt #2c	Brooklyn	NY	11212
Byrd, Shantel	112 Hoyt St	#2J	Stamford	CT	06905
Castillo, Nelson	66 Elm St		Staten Island	NY	10310
Castro, Omar R	1296 Sheridan Ave	2c	Bronx	NY	10456
Chow, Kenneth	3137 Coney Island Ave		Brooklyn	NY	11235
Chowdhury, Syed A	134-01 86th Road		Richmond Hill	NY	11418
Cines, Keyla	122 Tribow St	Apt #1	Brockton	MA	02301
Coleman, Boyce	24 Fairview St		Waterbury	CT	06710
Collado, Irving E	Po Box 560192		College Point	NY	11356
Colon, Carlos	1725 Randall Ave	#2C	Bronx	NY	10473
Correa, Juan C	247 Woodbine St		Brooklyn	NY	11221
Crespo, Jessica Y	4 River Road	Roosevelt Island	New York	NY	10044
Cruz, Adolfo	808 Park Ave	#1F	Brooklyn	NY	11206
Cynthia, Fincher M	5800 Arlington Ave	Apt 5s	Bronx	NY	10471
Dacres, Owen A	1003 Willmohr St	Apt B2	Brooklyn	NY	11212
Dardaine, Wilton A	342 Fenimore ave		Uniondale	NY	11553
Datilus, David E	1283 Brooklyn Ave	Apt #1	Brooklyn	NY	11203
Deandre, Harris L	197 Drake Ave.	10	Yonkers	NY	10805
DeLarosa, Denny M	2405 1st Ave	#86	New York	NY	10035
Dionicio, Julio	442 160th St	#4d	New Yourk	NY	10032
Ezequiel, Ortiz	3760 Notch St		Macugie	PA	18062
Fenton, Damian C	550 Cauldwell Ave	#15E	Bronx	NY	10455
Figeroux, David	347 Bedford Ave		Uniondale	NY	11553

Is K         139-16 232nd St         Lauretton         NY           John K         4230 Hill Avenue         Bronx         NY           J         179-16 2326th St         Lauretton         NY           J         179 Plateau Ave         Fort Lee         NJ           J         130-32 236th St         Lauretton         NY           J         150 Lefferts Ave         #5B         Brooklyn         NY           J         179 Lefferts Ave         #5B         Brooklyn         NY           J         179 Lefferts Ave         #5B         Brooklyn         NY           J         150 Lefferts Ave         #5B         Brooklyn         NY           J         150 Lefferts Ave         #5B         Brooklyn         NY           J         14 Carrol St         APT #4F         Brooklyn         NY           M         472 Franklin Ave         Apt 22         Mount Vernon         NY           M         472 Franklin Ave         Apt 42         Brooklyn         NY           M         149-03 85th ST         Jamaica         NY           J         14903 Both St         7c         Vonkers         NY           J         1800 Lefferts Ave         Apt	0/631	Z	Englewood		1// Worse PI	Ram, Brijesn i
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Is K         139-16 232nd St         Laurelton         NY           pher K         135-36 229 <sup>th</sup> St         Lauretton         NY           pony K         4230 Hill Avenue         Bronx         NY           J         279 Plateau Ave         Fort Lee         NJ           130-32 236th St         Laurelton         NY           150 Lefferts Ave         #5B         Brooklyn         NY           yD         3760 Notch Street         21         Brooklyn         NY           yD         3760 Notch Street         3d         Brooklyn         NY           yO         NY         NY         NY <tr< td=""><td>10602</td><td>NY</td><td>White Plains</td><td></td><td>P.O. Box 1818</td><td>Kimble, Eugene</td></tr<>	10602	NY	White Plains		P.O. Box 1818	Kimble, Eugene
Is K         139-16 232nd St         Laurelton         NY           Opher K         135-36 229 <sup>th</sup> St         Lauretton         NY           Iony K         4230 Hill Avenue         Bronx         NY           J         279 Plateau Ave         Fort Lee         NJ         0           J         130-32 236th St         Laurelton         NY           Laurelton         NY         0         0           150 Lefferts Ave         #5B         Brooklyn         NY           Ny D         3760 Notch Street         21         Brooklyn         NY           Ny D         3760 Notch Street         3d         Brooklyn         NY           Ny D         1587 Carrol St         3d         Brooklyn         NY           Ny D         1587 Carrol St         Apt #4         Brooklyn         NY           N         Macungie         PA         NY           N         Apt #4         Brooklyn         NY           N         Apt #22         Mount Vernon         NY           Ianuel         430 Union St         7c         Yonkers         NY           Ianuel         53 Bushwick Ave         #5B         Brooklyn         NY	11373	NY	Elmhurst			Khalil, Mohammed
Is K         139-16 232nd St         Laurelton         NY           Opher K         135-36 229th St         Lauretton         NY           Jonny K         4230 Hill Avenue         Bronx         NY           J         279 Plateau Ave         Fort Lee         NJ         NY           J         130-32 236th St         Laurelton         NY         NY           J         150 Lefferts Ave         #5B         Brooklyn         NY           J         150 Lefferts Ave         21         Brooklyn         NY           J         17 Hill St         21         Brooklyn         NY           NY         NY         NY         NY         NY           NY         1587 Carrol St         Apt #4         Brooklyn         NY           N         93 William St         Apt #4F         Yonkers         NY           N         149-03 85th ST         Apt #2         Mount Vernon         NY           Ia         149-03 85th ST         Apt Brooklyn         NY           Ia         150 School St         7c         Yonkers         NY	11206	NY	Brooklyn		533 Bushwick Ave	Justiniano, Emanuel
C         139-16 232nd St         Laurelton         NY           er K         135-36 229th St         Lauretton         NY           y K         4230 Hill Avenue         Bronx         NY           279 Plateau Ave         Fort Lee         NJ         10           130-32 236th St         Laurelton         NY         10           150 Lefferts Ave         #5B         Brooklyn         NY         17           17 Hill St         21         Brooklyn         NY         17           17 Hill St         21         Macungie         PA         17           1587 Carrol St         3d         Brooklyn         NY         17           10 Jamaica         Apt #4         Brooklyn         NY         17           11 Hill St         Apt #4         Brooklyn         NY         NY           12 South 3rd St         Apt #4         Brooklyn         NY           13 St School St         Apt #4         Brooklyn         <	11213	NY	Brooklyn	#5B	1803 Union St	James, Darryl
C         139-16 232nd St         Laurelton         NY           er K         135-36 229th St         Lauretton         NY           / K         4230 Hill Avenue         Bronx         NY           279 Plateau Ave         Fort Lee         NJ         130-32 236th St           130-32 236th St         Laurelton         NY         1472 Firanklin Ave         Laurelton         NY           150 Lefferts Ave         #5B         Brooklyn         NY         NY           177 Hill St         21         Brooklyn         NY           1587 Carrol St         3d         Brooklyn         NY           1587 Carrol St         3d         Brooklyn         NY           1425 South 3rd St         Apt #4         Brooklyn         NY           472 Franklin Ave         Apt #4F         Yonkers         NY           149-03 85th ST         Apt #4F         Yonkers         NY           3236 Seymour Ave         2nd Floor         Brooklyn         NY	10701	NY	Yonkers	7c	55 School St	Jackson, Theresa
C         139-16 232nd St         Laurelton         NY           er K         135-36 229 <sup>th</sup> St         Lauretton         NY           / K         4230 Hill Avenue         Bronx         NY           279 Plateau Ave         Fort Lee         NJ         130-32 236th St           130-32 236th St         Laurelton         NY           150 Lefferts Ave         #5B         Brooklyn         NY           17 Hill St         2l         Brooklyn         NY           1587 Carrol St         Apt #4         Brooklyn         NY           1587 Carrol St         Apt #4         Brooklyn         NY           93 William St         APT #4F         Yonkers         NY           472 Franklin Ave         Apt 22         Mount Vernon         NY           149-03 85th ST         Apt #4         Jamaica         NY	10469	NΥ	Bronx	2nd Floor	3236 Seymour Ave	Jackson, Cecilia
C         139-16 232nd St         Laurelton         NY           er K         135-36 229 <sup>th</sup> St         Lauretton         NY           / K         4230 Hill Avenue         Bronx         NY           279 Plateau Ave         Fort Lee         NJ         NY           130-32 236th St         Laurelton         NY         NY           150 Lefferts Ave         #5B         Brooklyn         NY           17 Hill St         2l         Brooklyn         NY           3760 Notch Street         2l         Macungie         PA           1587 Carrol St         3d         Brooklyn         NY           93 William St         Apt #4F         Brooklyn         NY           472 Franklin Ave         Apt 22         Mount Vernon         NY	11435	NY	Jamaica		149-03 85th ST	Hussain, Syed A
C         139-16 232nd St         Laurelton         NY           er K         135-36 229 <sup>th</sup> St         Lauretton         NY           / K         4230 Hill Avenue         Bronx         NY           279 Plateau Ave         Fort Lee         NJ           130-32 236th St         Laurelton         NY           130-32 236th St         Laurelton         NY           150 Lefferts Ave         #5B         Brooklyn         NY           17 Hill St         2l         Brooklyn         NY           1587 Carrol St         3d         Brooklyn         NY           1585 South 3rd St         Apt #4         Brooklyn         NY           93 William St         APT #4F         Yonkers         NY	10550	NY	Mount Vernon	Apt 22	472 Franklin Ave	Hunter, Joseph M
Eer K         139-16 232nd St         Laurelton         NY           / K         4230 Hill Avenue         Bronx         NY           279 Plateau Ave         Fort Lee         NJ           130-32 236th St         Laurelton         NY           130-32 236th St         Laurelton         NY           150 Lefferts Ave         #5B         Brooklyn         NY           17 Hill St         2l         Brooklyn         NY           3760 Notch Street         2l         Macungie         PA           1587 Carrol St         Apt #4         Brooklyn         NY	10701	NY	Yonkers	APT #4F	93 William St	Hood, Katrina M
For K       139-16 232nd St       Laurelton       NY         I 139-16 232nd St       Lauretton       NY         I 135-36 229 <sup>th</sup> St       Bronx       NY         279 Plateau Ave       Fort Lee       NJ         130-32 236th St       Laurelton       NY         130-32 236th St       Laurelton       NY         150 Lefferts Ave       #5B       Brooklyn       NY         17 Hill St       2l       Brooklyn       NY         3760 Notch Street       2l       Macungie       PA         1587 Carrol St       3d       Brooklyn       NY	11211	NY	Brooklyn	Apt #4	225 South 3rd St	Hernandez, Fernando J
139-16 232nd St       Laurelton       NY         er K       135-36 229th St       Lauretton       NY         / K       4230 Hill Avenue       Bronx       NY         279 Plateau Ave       Fort Lee       NJ         130-32 236th St       Laurelton       NY         150 Lefferts Ave       #5B       Brooklyn       NY         17 Hill St       2l       Brooklyn       NY         3760 Notch Street       Macungie       PA	11213	NY	Brooklyn	3d	1587 Carrol St	Heaven, Rohan
us K         139-16 232nd St         Laurelton         NY           opher K         135-36 229 <sup>th</sup> St         Lauretton         NY           hony K         4230 Hill Avenue         Bronx         NY           I J         279 Plateau Ave         Fort Lee         NJ           I 130-32 236th St         Laurelton         NY           I 30-32 236th St         Laurelton         NY           150 Lefferts Ave         #5B         Brooklyn         NY           aira         17 Hill St         21         Brooklyn         NY	18062	PA	Macungie		3760 Notch Street	Guzman, Juany D
us K         139-16 232nd St         Laurelton         NY           opher K         135-36 229 <sup>th</sup> St         Lauretton         NY           hony K         4230 Hill Avenue         Bronx         NY           J         279 Plateau Ave         Fort Lee         NJ           I         130-32 236th St         Laurelton         NY           J         150 Lefferts Ave         #5B         Brooklyn         NY	11208	NY	Brooklyn	21	17 Hill St	Guerrero, Yajaira
Js K       139-16 232nd St       Laurelton       NY         ppher K       135-36 229 <sup>th</sup> St       Lauretton       NY         lony K       4230 Hill Avenue       Bronx       NY         J       279 Plateau Ave       Fort Lee       NJ         130-32 236th St       Laurelton       NY         Laurelton       NY	11225	NY	Brooklyn	#5B	150 Lefferts Ave	Green, Eric D
Js K       139-16 232nd St       Laurelton       NY         pher K       135-36 229 <sup>th</sup> St       Lauretton       NY         lony K       4230 Hill Avenue       Bronx       NY         J       279 Plateau Ave       Fort Lee       NJ         Laurelton       NY	11422	NY	Laurelton		130-32 236th St	Graham, Errol
k K         139-16 232nd St         Laurelton         NY           bher K         135-36 229 <sup>th</sup> St         Lauretton         NY           bny K         4230 Hill Avenue         Bronx         NY           279 Plateau Ave         Fort Lee         NJ	11422	N Y	Laurelton		130-32 236th St	Graham, Errol
139-16 232nd St	07024	Z	Fort Lee		279 Plateau Ave	Gorrin, Daniel J
139-16 232nd St         Laurelton         NY           135-36 229 <sup>th</sup> St         Lauretton         NY	10466	NΥ	Bronx		4230 Hill Avenue	Freeman, Anthony K
139-16 232nd St Laurelton NY	11413	NY	Lauretton		135-36 229 <sup>th</sup> St	Folkes, Christopher K
100 10 000	11413	NΥ	Laurelton		139-16 232nd St	Figueroa, Jesus K

10000	N Y	New York	16	555 Fdr Drive	Zapata Abrey, Alexander
11213	NY	Brooklyn	#3D	1587 Carrol St	Wright, Leanora P
10703	NY	Yonkers		39 Convent Ave	Williams, David
10704	NY	Yonkers	Apt #2	39 Winfred Ave	William, Still P
10701	NY	Yonkers	Apt 3a	41 Hawthorne Ave	White, Bryant
20774	NY	Upper Marlboro		13602 Tree Leaf Ct	Vines, Donald M
10029	NY	New York	#3A	1735 Madison Ave	Velez, Claudia M
11207	NY	Brooklyn	#3d	17 Van Siclen	Traverzo, Drew
10701	NY	Yonkers		80 School St	Torres, Barron
10458	NY	Bronx	Apt #1	316 E 184th St	Tavares, Maria
11413	NY	Sprigfield Gard	Blvd	138-53 Sprigfield	Tate, Joseph L
11435	NY	Jamaica		149-03 85th Rd	Syed, Tabish
10550	NY	Mount Vernon	Apt 2	121 So 14th Ave	Spence, Andrew O
11354	NY	Flushing		32-22 Murray Lane	Soohoo, Wendy
10462	NY	Bronx	Apt 6f	1604 Metropoltan Ave	Shamsuzzoha, Nafis
11372	S NY	JAckson Heights	#4d	35-63 79th St	Salazar, Diana
11211	NY	Brooklyn		322 Rodney St	Salas, Andres
11237	NY	Brooklyn		474 Suydam St	Ruiz, Josue
11379	NY	Middle Village		63-17 83 <sup>rd</sup> PI	Ruiz, Jose A
10469	NY	Bronx		3546 Corsa Ave	Rose, Brandon
11415	NY	Sprigfield Gard		141-54 184th St	Rose, Alquon
10462	NY	Bronx	#6a	2039 Cruger Ave	Rosado, Jose
11226	NY	Brooklyn	Apt 4a	351 E 21 St	Rodriguez, Michael J
10705	NY	Yonkers	2nd Flr	183 Sedgwick Ave	Rivas, Reginald
10473	NY	Bronx	Apt 2c	1711 Lacombe Ave	Rijos Jr, Carlos
10040	NY	New York	#61	165 Nagle Ave	Ramirez, Luis B